TAN AH CHIM & SONS SDN. BHD.

v.

OOI BEE TAT & ANOR.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 449 OF 1981]
12 OCTOBER 1992

CONTRACT: Sale and purchase of land - Joint venture agreement for development of the land - Assignment of first defendant's interests to second defendant - Whether agreement provided for assignment - Whether parties entitled to assign contract - Knowledge and conduct of parties - Whether assignment valid - Whether there was consideration for the assignment - Plaintiffs terminating agreement and claiming compensation - Whether termination valid - Whether plaintiffs claim barred by waiver, acquiescence, laches and estoppel - First defendant counterclaiming for specific performance - Whether first defendant has cause of action - Second defendant claiming for specific performance and damages - Reliance on the doctrine of substantial performance - Whether appropriate - Plaintiff and first defendant entering into settlement agreement - Whether agreement binding on second defendant who was not a party to the agreement.

CONTRACT: Building contract - Claim for specific performance - Whether party entitled to damages as well - Discretion of Court - Assessment of damages - Date of assessment of damages - Whether damages to be assessed at date of breach or at date of trial - Principles applicable in the calculation of damages - Interest on damages - Rate of interest pre-trial and post-trial - Civil Law Act 1956, s. 11 - Rules of the High Court 1980, O. 42 r. 12.

PRACTICE & PROCEDURE: Departure from pleadings - Allegations of fraud, misrepresentation and manipulation raised by way of cross-examination - Allegations not pleaded and particularised in pleadings - Whether party can be allowed to raise allegations - Plaintiffs making application for enquiry into damages after delivery of oral decision - Plaintiffs not dealing with issue of quantum during the course of the trial - Whether plaintiffs application should be allowed.

EVIDENCE: Words in written contract clear and unambiguous - Whether introduction of extrinsic or oral evidence in contradiction of clauses of contract admissible in evidence - Application of ss. 91 & 92 of Evidence Act 1950 - Allegations of fraud, misrepresentation and manipulation in civil case - On whom lies the burden of proof - Standard of proof - Whether on balance of probabilities or beyond reasonable doubt.

WORDS AND PHRASES JUDICIALLY DEFINED: "Waiver" - "Acquiescence".

Pursuant to a Joint Venture Agreement (JV) Tan Ah Chim (TAC) had agreed to sell and D1 had agreed to purchase the land in consideration of D1 erecting various houses and shoplots for TAC known as the "Green Lane Project" and subject to the terms and conditions as set out therein.

Thereafter, TAC sold the land to the plaintiff which is a family company of which TAC was the founder subject to the rights and obligations under the JV. Some time later, D1 purported to assign all his right, title and interest under the JV to D2 a family company of which D1 was the founder and the plaintiff had been duly notified of the said assignment. Pursuant to the JV, D2 had commenced construction work on the land but as events turned out, the construction work on the Green Lane Project ground to a halt.

In consequence, the plaintiff alleged that D1 is liable to pay the plaintiff compensation at the rate of RM10 per day in respect of each dwelling house and shoplot from January 1979. The plaintiff further alleged that the structures were not built in accordance with specification and material, and that workmanship used were of inferior quality and that D1 did not possess the financial ability to carry out the JV and in consequence, the same was frustrated. The plaintiff further took the position that TAC had entered into the JV by reason of D1's skill and competence and therefore the JV was not assignable.

D1 filed a counterclaim against the plaintiff, *inter alia*, for specific performance of the JV and the contention advanced on behalf of D1 was that the plaintiff had no reasonable cause to terminate the JV and the plaintiff had failed to give vacant possession of the whole land within the time stipulated therein. Further, D1 alleged that time for completion had been extended and that he was ready and willing to complete but was prevented from so doing by the wilful default of the plaintiff or alternatively, the plaintiff had by its own conduct waived any alleged breach or alternatively, if the assignment agreement is valid, then the plaintiff has no cause of action against him but it was said by D1 that the assignment was null, void and of no effect for total failure of consideration of RM60,000 as stated therein and so was rescinded.

D2 applied to be joined as a 2nd defendant and had filed a counterclaim against the plaintiff *inter alia*, for specific performance of the JV including allowing D2 as successor in title and/or assignee of D1 to carry out its obligations and exercise its rights under the same, an injunction restraining the plaintiff from interfering with D2's construction work, actual and consequential damages and interests. D2 contended that by the Assignment Agreement D1 had formally and unconditionally assigned all his right, title and interest in the joint venture and D2 had informed the plaintiff on the said assignment. D2 contended that the plaintiff was in breach of the JV and had caused losses, damages and hardship to it and had refuted the plaintiff's allegation that the JV entered was based on D1's skill and competence in that the plaintiff was well aware that D2 was a family company engaged in the construction field either as builder or contractor whose managing director was D1 and the building scheme would be carried out by D2 and that the plaintiff expressly or impliedly agreed to D2 to carry out obligations of D1 under the JV and the plaintiff knew D1 had assigned all responsibilities in respect of the building scheme and took no objection and that in carrying out the JV they had expended considerable amount of monies and were prevented from continuing the work because the plaintiff prevented them from proceeding with the work and D2 relied on the doctrine of substantial performance.

By reason of the matters mentioned it was contended by D2 that the plaintiff's claims were barred by waivers, laches, acquiesces and estoppel and was precluded from rescinding the JV. Further, D1 had unconditionally assigned all his right, title and interest in the JV to D2 and the plaintiff had been informed of the same. Further, the contention that the Assignment Agreement is bad in law for failure of consideration is untenable as the consideration therein had been paid in full and D1's attempt to rescind the same was ineffective.

Held:

[1] The intention of the parties, judged purely from the words appearing in clause 22 is that both the parties to the JV were to be at liberty to assign their rights, title and interest under it without the need for consent by the other party and the conduct of the parties following the execution of the JV, reinforces the view, that it was their intention that their rights, title and interest thereunder were to be freely assignable.

[2] Clause 22 is unmistakably clear and unambiguous, any attempt to introduce extrinsic or oral evidence in flat contradiction of clause 22 would be inadmissible under ss. 91 and 92 of the Evidence Act.

[3] The plaintiff, was aware that building works on what was known as the Green Lane Project which fell within the scope of the JV were being carried out by D2 ever since August 1977 and further, the plaintiff raised no objection when two of their directors had been informed by D2 by letter dated 15 February 1979 that it (D2) would continue with the construction works on the land.

[4] The allegation of D1 that the Assignment Agreement has been rescinded because of non-payment of the consideration of RM60,000 has to be tested against certain background facts concerning the course of dealings between D1 and D2 in the contracting field, including the financial assistance rendered by D2 to D1 by raising loans from banks upon the security of charges over D2's lands.

[5] The Assignment Agreement is perfectly valid in law as the parties to the JV were free to assign their rights and obligations thereunder and the Assignment Agreement was made for the consideration of RM60,000 which D1 had duly received from D2 and D1 had no right to rescind the Assignment Agreement.

[6] If the parties thereto were not at liberty to assign their rights thereunder, then the plaintiff had waived the condition against assignment or, alternatively, had by their conduct acquiesced, in D2 stepping into the shoes of D1 for purposes of carrying out the Green Lane Project.

[7] Waiver is the abandonment of a right and is either express or implied, it may be implied from conduct which is inconsistent with the construction of the right. Acquiescence implies that a person abstains from interfering while a violation of his rights is in progress.

[8] TAC was aware that the *modus operandi* of D1 entering into Agreements of this kind was not only to engage D2 to carry out the building construction work but also to rely on D2 to raise the necessary finance by charging its land to banks from time to time which may well explain

why clause 22 of assignment of rights, title and interest without qualification which is an unusual clause in a building contract had been inserted.

[9] The plaintiff was fully aware that D2 had commenced work in August 1977 but raised no objection whatever to the works being carried out by D2 and D2 stepping into the shoes of D1, until November 1979 when the plaintiff resorted to physical force to stop D2 from proceeding with the work and, in particular, instigated the assault upon Ooi Kim Keat (DW2) on 26 November 1979 at the site by its servant or agent the object of the assault being to bring the work on the site to a standstill.

[10] D2 had done a considerable amount of work on the Green Lane Project and the expenditure incurred by it in this regard appears from the uncontradicted Audited Accounts and the Report of its Charted Quantity Surveyor. D1 did not adduce a scrap of evidence to show that he had done any work on the Green Lane Project though Counsel had, on his behalf, said that he would do so. It would be reasonable therefore to infer that no such evidence was produced simply because there was none.

[11] The Settlement Agreement which fell through because of the inability of D1 to fulfill his financial obligations thereunder, though D1 sought to camouflage this by the excuse that there was no resolution by the plaintiff's board authorising the settlement, was nothing more than a concerted attempt by the plaintiff and D1 to exclude D2 from the Green Lane Project, in contravention of the Assignment Agreement entered into by D1 and D2. In any event, the so called admission was, in no way binding upon D2 who was not a party to the Settlement Agreement.

[12] There was no waiver of the requirement under the JV as to the giving of vacant possession of the lands concerned by the plaintiff when D1 proceeded with the construction work before the plaintiff yielded vacant possession of the site, as contended on behalf of the plaintiff, because D1 never intended to release or not to assert his rights.

[13] No evidence whatsoever had been adduced on behalf of the plaintiff in support of the contention that the construction work was defective although Counsel for the plaintiff had categorically stated that he would be calling expert evidence in support of the same. It was obvious that the plaintiff was in breach of the contract from beginning to end and was wholly to blame for causing construction work on the Green Lane Project to grind to a halt.

[14] Neither fraud nor misrepresentation had ever been alleged by the plaintiff in their pleading but Counsel for the plaintiff made attempts to allege fraud and misrepresentation and manipulation of accounts against D2 by way of cross-examination. It is settled law that where it is sought to rely upon a plea based thereon, the allegation therein must be pleaded and particularised in which case the onus lies upon the party making the allegation to prove the same beyond reasonable doubt. Therefore, the allegations made by way of cross-examination by Counsel for the plaintiff should be given short shrift and dismissed.

[15] In principle, the Court has a discretion to order specific performance and damages in favour of a party. Land is always deemed to have a special value the loss of which may not be adequately compensated by damages. The evidence adduced disclosed that D2 had put in a tremendous amount of work and labour and also expanded considerable sums of money in discharge of its obligations under the JV until they were wrongfully and without just cause excluded from the site by force of arms. Therefore there is considerable justification for invoking the doctrine of substantial performance in favour of D2.

[16] In assessing the quantum of damages, the broad fundamental principle as to assessing the measure of damages is that sum of money which will put the party who has suffered, in the same position he would have been if he had not sustained the wrong for which he is getting the compensation or reparation.

[17] The material date at which damages fall to be assessed is the date of the hearing. Since an integral part of the JV concerned land and the construction of dwelling houses and shophouses thereon, and as D2 had refused to accept the plaintiff's wrongful repudiation but chose to keep the contract open and alive, it would be obviously unjust to assess damages at the date of the breach and the appropriate date for assessment of damages would be the date of hearing.

[18] The statutory power of the Court to award interest is governed by s. 11 of the Civil Law Act 1956. The principle underlying the award of

interest is not to compensate a party for any damage done, but for him being kept out of his money.

[19] As to the appropriate rate of interest D2 had chosen the judgment debt rate of 8 per cent per annum. So far as the claim for interest on damages for the pre-judgment period is concerned, Counsel for the plaintiff had chosen to say nothing as regards this issue and therefore the judgment debt rate of 8 per cent per annum chosen by D2 for the pre-judgment period is not an unreasonable one and the same is adopted.

[20] Further D2 is given 18 months, from the date of approval of building plans by the relevant authorities or from the date when vacant possession of the sites concerned are given by the plaintiff to D2, whichever is the later, in order to complete the project pursuant to the JV.

[21] Leading Counsel for the plaintiff had only after the Court had delivered the decision submitted that the Court had not taken into account the fact that specific performance having been decreed in favour of D2 against the plaintiff, D2 will be completing the dwelling houses and selling them at present market values. What Counsel was driving at was that in assessing D2's claim for loss of profits, there should be brought into account the profits expected to be earned when the dwelling houses are eventually completed and sold, it being assumed that such sales would fetch higher profits than would have been the case had D2 not sustained the wrong for which he is getting compensation or reparation and he prayed for an inquiry as to damages to take that into account.

[22] As Counsel for the plaintiff had made no attempt at all to deal with the issue of quantum of damages in his written submission, and the record of proceedings will show that extensive evidence was adduced on behalf of D2 in the shape of testimony and reports from the Quantity Surveyor Mr. Saw Soon Kooi and the Registered Valuer Mr. Long Tian Chek, yet at no time when they were in the witness box was a single question put to either witness to establish at what prices the buildings concerned might have been sold having regard to the current market prices. Nor, for that matter, was any expert evidence adduced on behalf of the plaintiff on this point although Counsel for D2 had categorically stated that he would be calling expert evidence on the quantum of damages and, indeed, Counsel for D2 had, in his written submission, directed the attention of the Court to this glaring omission, and Counsel for the plaintiff had omitted to deal with this in his written submission. There was ample opportunity for the plaintiff to elicit that point by way of cross-examination of D2's experts or by adducing evidence in rebuttal in the shape of expert testimony yet advantage was not taken of this opportunity. To grant the request would lead to unnecessary prolongation of what was already a length trial with a consequent increase in costs and would have meant giving the plaintiff a second opportunity to prove a point which the plaintiff failed to do at the trial.

[Plaintiff's claim dismissed with costs. D1's counterclaim dismissed. D2's counterclaim allowed with costs].

Cases referred to:

Tolhurst v. Associates Portland Cement Manufacturers Ltd. [1903] AC 414 ***(refd)***
Penn v. Simonds [1971] WLR 1381 ***(refd)***
Plantation Agents v. Haji Ariffin bin Ismail [1978] 1 MLJ 219 ***(refd)***
IRC v. Raphael [1935] AC 96, at 142 ***(refd)***
Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 WLR 989 ***(refd)***
Keene v. Biscoe [1876] 8 Ch. D. 201 ***(refd)***
Selwyn v. Garfit [1888] 38 Ch. D. 273, CA ***(refd)***
Stokoe, Ex parte Moore [1876] 2 Ch. D. 802, CA ***(refd)***
Duke of Leeds v. Earl of Amherst [1846] 2 Ph. 117 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 121 ***(foll)***
Lee You Sin v. Chong Ngo Khoon [1982] 2 MLJ 15 ***(foll)***
Ong Heok & Anor. v. Ooi Bee Tat & Ors. [1982] 2 MLJ 326 ***(refd)***
Doshi v. Yeoh Keong Lay [1975] 1 MLJ 85 ***(refd)***
Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] 28 CLR 305 ***(foll)***
Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd.[1990] 1 CLJ 133 / [1989] 3 MLJ 360 ***(refd)***
Letchumi Ammal v. Nam Fong Housing Sdn. Bhd. [1982] CLJ 295 / [1982] 2 MLJ 19 ***(refd)***
Oon Hock Lai & Anor. v. Lee Kok Leong [1990] 1 CLJ 951 ***(refd)***
Jania Beevi v. Govindaswami [1967] AIR Mad 369 ***(refd)***
Low Lup Piow & Ors. v. Lee Soh Hua [1983] 1 MLJ 304 ***(refd)***
Livingstone v. Rawyards Coal Co. [1880] 5 App Cas 25 ***(foll)***
Johnson v. Agnew [1980] AC 367 ***(refd)***
Radford v. De Froberville [1977] 1 WLR 1262 ***(refd)***
Hadley v. Baxendale [1854] 9 Ex ***(refd)***
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB ***(refd)***
Wraight Ltd. v. P.H. & T. (Holdings) Ltd. [1968] 13 BLR 27 ***(foll)***

The London, Chatham & Drover Railway Co. v. The South Eastern Railway Co. [1893] AC 429 ***(foll)***
Lim Yak Hua v. Eastern & Oriental Hotel [1951] Sdn. Bhd. [1988] 2 CLJ 671 / [1988] 3 MLJ 151 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contract Act 1950, s. 42
Evidence Act 1950 (Revised 1974), ss. 91 & 92
Specific Relief Act 1950 (Revised 1974), ss. 11(1), (2), 18(1), (2), (3), 20(1), (2), 21(1), (2), (3), 22
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:
Building Contract Claims (2nd Edn.), Vincent Powell-Smith & John Sims @ pp. 136, 137 & 144
Specific Performance, Jones and Goodhart, 1986 @ p. 20

For the plaintiff - Lim Kean Siew (Dr. Jagjit Singh Sidhu with him); M/s. Lim Kean Siew & Co.
For the 1st defendant - Yap Chye Choon; M/s. Yap Chye Choon & Co.
For the 2nd defendant - N.G. Sivanandhan (Karen Lim with him); M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr SCJ:
By an agreement in writing dated 20 May 1977, ("the joint venture agreement") entered into by a certain Tan Ah Chim, of the one part, and a certain Ooi Bee Tat, the first defendant ("D1") of the other part, D1 had agreed to purchase and Tan Ah Chim had agreed to sell the land comprised in Holding No. 70, Town Subdivision 5, North East District Penang, ("the land"), for the construction of dwelling houses described therein and subject to the terms and conditions set out therein.

More particularly, the principal terms and conditions of the joint venture agreement so far as material to this suit were these:

(1) part of the purchase price of the land was to consist of dwelling houses to be erected thereon by D1 for the benefit of Tan Ah Chim. (Clauses 2 and 11);
(2) the building scheme on the land was to be carried out in two phases. (Clause 9);
(3) D1 had undertaken to complete the construction of the dwelling houses and obtain occupation certificates in respect thereof within 18 months of being given possession of the site. (Clause 11); and
(4) if D1 were to be in default of his obligations under Clause 11 then he was to incur liability to compensate Tan Ah Chim at the rate of RM10 per day in respect of each dwelling house and, if after a period of 18 months from the date of such default, D1 were to fail to obtain the required occupation certificates, Tan Ah Chim was to have the right to rescind the agreement. (Clause 13).

In addition, it was contended for the plaintiff that the following terms were to be implied under the joint venture agreement:

(1) that D1 would carry out his work in a proper and workmanlike manner using materials of good quality and reasonably fit for their purpose; and
(2) that Tan Ah Chim relied on the skill and judgment of D1 as a building contractor and upon his financial ability to carry out the works.

Some 15 months after the execution of the joint venture agreement; more particularly, on 27 August 1978, Tan Ah Chim had, by an agreement in writing dated the same date, sold the land to the plaintiff Tan Ah Chim & Sons Sdn. Bhd. - a family company of which Tan Ah Chim was the founder - subject to the rights and obligations under the joint venture agreement, and D1 had by a letter dated 26 May 1979, consented to the sale, on condition that all the rights and obligations of the parties under the joint venture agreement were to be assumed by the plaintiff and D1.

Pursuant to the joint venture agreement, D1 had commenced construction work on the land but, as events turned out, he was unable to complete the same.

In consequence, the plaintiff alleges that D1 is, by virtue of the joint venture agreement, liable to pay to the plaintiff compensation at the rate of RM10 per day in respect of each dwelling house and as 15 dwelling houses were involved, this would amount to RM150 per day from January 1979.

The plaintiff further alleges that the construction work carried out by D1 was seriously defective in that:

(a) the structures were not built according to the specifications of the contract; and
(b) the materials used and the workmanship were of inferior quality,

and although D1 had been notified of the same by a letter in writing dated 22 January 1979

from the Consultant Engineer concerned, he had not carried out any remedial works, and that in consequence, he was in breach of contract.

Additionally, the plaintiff alleges that D1 did not possess the wherewithal or the financial means to carry out his obligations under the joint venture agreement and, in consequence, the same was frustrated.

It would be pertinent, at this stage, to refer to another event; namely, the entry on the scene of the second defendant Ooi Bee Tat & Sons Sdn. Bhd. ("D2"), it being the family company of which D1 was the founder. This requires me to refer to an assignment agreement in writing dated 14 June 1979, ("the assignment agreement") whereby D1 purported to assign all his right, title and interest under the joint venture agreement to D2.

D2's solicitors had by a letter dated 1 October 1979 notified the plaintiff of the assignment agreement, but the plaintiff challenged the validity of the same and refused to have any dealings with D2 and also took the position that Tan Ah Chim had entered into the joint venture agreement with D1 because of the latter's skill, experience and judgment as a building contractor and the friendly relations which subsisted between them. Moreover, it was said that the relationship between the plaintiff and D2 had never been amicable and that the plaintiff had no confidence in the competence of D2 as a building contractor.

In any event, it was contended on behalf of the plaintiff that if the assignment agreement were valid in law, the joint venture agreement had been lawfully rescinded by the plaintiff for the reasons stated, and so, on this further ground also, D2 was liable to the plaintiff.

In particular, the plaintiff alleged that it had lost the benefit of the joint venture agreement, that is to say, the profits it would have received from the rentals or sales of the dwelling houses it would have been entitled to under the same.

In the circumstances, the plaintiff prayed for judgment against D1 and D2 as follows:

(a) a declaration that on the true construction of the joint venture agreement, it was rescinded;
(b) a declaration that, on the true construction of the joint venture agreement and the events which have happened in law, D1 was not entitled to convey or transfer to D2 his right, title or interest in the joint venture agreement without the consent of the plaintiff;
(c) damages;
(d) interest; and
(e) costs.

I must now turn to consider the case for D1.

The primary defence advanced on behalf, of D1 was that by Clause 8 of the joint venture agreement, the plaintiff was obliged to deliver vacant possession of the land and that construction work thereon would be carried out in two phases as indicated in the Layout Plan as follows:

> The building scheme on the said land shall be carried out and developed in two (2) phases as shown in ink shading on the Layout Plan:
>
> (i) within 18 months of vacant possession being obtained of the land comprised in Phase I, 2 Type A houses, 28 Type B houses and 6 Type C houses shall be erected and completed for occupation; and
>
> (ii) within 18 months of vacant possession being obtained of the land comprised in Phase II and provided all the houses comprised in Phase I shall have been completed, the remaining 9 Type A houses shall be erected and completed for occupation.

Yet, it was said, the plaintiff had failed to give D1 vacant possession of the whole of the land. In particular, it was said that at the time D1 was given possession of the land there were eight squatters in occupation thereof, and that it was not until 3 April 1981 that vacant possession was in fact given with the result that time to commence construction work began to run only with effect from that date and so the date for completion was to be on or before 3 October 1982.

A further defence advanced on behalf of D1 was that it had on 20 July 1972 been agreed between him and the plaintiff that:

(1) in consideration of the payment of RM250,000, the plaintiff had agreed to discharge - all liabilities outstanding against D1 prior to 20 July 1982, and that time for completion would be extended by two years with effect from 20 July 1982;
(2) the plaintiff would forward to D1 a resolution of the Board of Directors of the plaintiff evidencing the said extension of time; and

(3) whereupon, the plaintiff would forthwith discontinue the suit herein.

Yet, it was said, the plaintiff never forwarded to D1 the said resolution nor discontinued the suit, although D1 was at all material times ready, willing and able to carry out his obligations under the joint venture agreement and, indeed, had been prevented from so doing by the wilful default of the plaintiff.

In these circumstances, it was contended on behalf of D1, that the plaintiff had no reasonable cause to terminate the joint venture agreement, in the manner it did by instituting this suit, and in the alternative, that even if it had, the plaintiff had by it own subsequent conduct in entering into the agreement for extension time of 20 July 1982, waived any alleged breach of the joint venture agreement by D1, thereby leaving it still subsisting, and/or the plaintiff was estopped by its conduct from raising the complaints appearing in the amended statement of claim.

Yet another defence advanced on behalf of D1 was that he had on 14 June 1979, assigned all his right, title and interest under the joint venture agreement to D2 in consideration of the payment to him of RM60,000, and that if the assignment agreement were good in law, the plaintiff had no cause of action against him. But, it was said that the assignment agreement was null, void and of no effect for total failure of consideration, and so was rescinded on 13 February 1980.

By his counterclaim, D1 claimed damages for loss of the chance of deriving a profit from the construction of 25 units of double storey terrace houses, 7 units of double storey shophouses and 11 units of double storey detached houses on the land particulars whereof are as follows:

Potential Income: RM5,494,000.
Estimated capital expenditure: RM2,889,632.
Loss of Potential Profit: RM2,604,368.

D1 also claimed specific performance of the joint venture agreement, compensation for delay caused by the plaintiff's breach of its obligations thereunder.

Lastly, D1 claimed interest on compensation, and damages at the rate of 8% p.a. and costs of the action.

By its reply and defence to counterclaim the plaintiff joined issue with D1 upon his defence and went on to say that the joint venture agreement had been rescinded and therefore in law the parties were precluded from agreeing to extend time for completion. The claim for loss of profits was denied and D1 was put to strict proof.

I must next turn to consider the defence advanced on behalf of D2.

In the first place, the implied terms alleged in the statement of claim (reproduced above) were denied.

In the second place, like D1, D2 also alleged that contrary to its obligations under the joint venture agreement, the plaintiff had failed to deliver vacant possession of the land.

More particularly, the plaintiff's allegations that Tan Ah Chim had entered into the joint venture agreement with D1 by reason of D1's skill, experience and judgment as a building contractor and the amicable relationship which subsisted between them **whereas** the relationship between the plaintiff and D2 had never been amicable and that the plaintiff had no confidence in D2 as a building contractor, were strongly refuted by D2, it being contended:

(1) that the plaintiff was well aware, right from the start, that as D2 was a family company primarily engaged in the construction field either as builder or contractor, and whose Managing Director was D1, the building scheme under the joint venture agreement would be carried out by D2;
(2) that the plaintiff had expressly or impliedly agreed to allow D2 to carry out the obligations of D1 under the joint venture agreement;
(3) that as from January 1979, D2 had assumed all responsibilities in respect of the building scheme on the land and although the plaintiff well knew about this, it raised no objection; and
(4) that in carrying out the construction works aforesaid, D2 had incurred considerable expenditure; more particularly, it had incurred expenses amounting to approximately RM440,772 in the construction of 16 terrace houses, 50% of seven shophouses and footings of two detached houses up to the time it had been wrongfully prevented by servants or agents of the plaintiff from proceeding with the said works and so was entitled to rely on the doctrine of substantial performance.

By reason of the matters hereinbefore mentioned, it was contended by D2 that the plaintiff's claims were barred by waiver, laches, acquiescence, and estoppel, so that it was precluded from rescinding the joint venture agreement.

It was further contended by D2 that by the assignment agreement, D1 had formally and unconditionally assigned all his right, title and interest in the joint venture agreement to D2 and that the plaintiff had been informed of this and a copy of the same had actually been sent to its solicitors on 1 October 1979, yet the plaintiff had not only challenged the legal validity of the assignment agreement but also wrongfully prevented D2 from continuing with the construction work.

In answer to D1's contention that the assignment agreement was bad in law for total failure of consideration, D2 said, in effect, that the contention was untenable, as the consideration of RM60,000 stated therein had in fact been paid in full and so D1's attempt to rescind the same was ineffective, and consequently, could not be relied upon by the plaintiff to defeat the right, title and interest under the joint venture agreement, which had accrued to D2.

By reason of the matters aforesaid, D2 contended that it was not it but the plaintiff which was in breach of the joint venture agreement and thus had caused considerable losses, damage and hardship to it.

In these circumstances, D2 by way of counterclaim, prayed for judgment against the plaintiff as follows:

(1) specific performance of the joint venture agreement; in particular, that it be ordered to carry out its obligations under the same, including allowing D2 as successor in title and/or assignee of D1 to carry out its obligations and exercise its rights under the same;
(2) an injunction restraining the plaintiff, by itself, its servants or agents from preventing or interfering with the building and construction works to be continued by D2, its servants or agents;
(3) actual and consequential damages;
(4) interest; and
(5) costs.

It would be more convenient if I consider the plaintiff's case against D2 first before considering its case against D1.

In my view, the **key issues**, in so far as the plaintiff and D2 are concerned, are twofold; namely,

(1) whether there was a valid assignment of the joint venture agreement from D1 to D2?
(2) if so, whether it was the plaintiff or D2 which was in breach of the joint venture agreement?

As to Question 1: By Clause 22 of the joint venture agreement, it was expressly provided that "this agreement shall be binding on the heirs, personal representatives, successors-in-title and assigns of the respective parties hereto."

I accept that this may well be an unusual clause to find in a joint venture agreement in the construction field where subjective considerations relating to the contractor and the employer can be most material; yet the parties deliberately chose to insert it. And, lest it be forgotten, this was an agreement drawn up by a solicitor, Mr. Gan Teik Chee. It is obvious, therefore, that it was the intention of the parties, judged purely from the words appearing in Clause 22 that both the parties to the joint venture agreement; namely, Tan Ah Chim and D1, were to be at liberty to assign their right, title and interest under it without the need for consent by the other party. (See *Tolhurst v. Associates Portland Cement Manufacturers Ltd.* [1903] AC 414, per Halbury, LC at 416, 420 and per Lord Lindlley at pp. 423.)

When, as here, the words of Clause 22 are unmistakably clear and unambiguous, any attempt to introduce extrinsic or oral evidence in flat contradiction of Clause 22 would be inadmissible under ss. 91 and 92 of the Evidence Act 1950, (Revised 1974) and therefore any submissions founded on such inadmissible evidence, would be totally untenable. As Lord Wilberforce said in *Penn v. Simonds* [1971] WLR 1381:

> In my opinion, then, evidence of negotiations, or of the parties intentions, and *a fortiori* of Dr. Simonds' intentions, ought not to be received.

In this context, the case of *Plantation Agents v. Haji Ariffin bin Ismail* [1978] 1 MLJ 219 also merits reading. It follows, that the testimony of the solicitor who prepared the joint venture agreement, as to the interpretation of Clause 22, must be disregarded.

But, as Lord Wright put it in *IRC v. Raphael* [1935] AC 96, at 142

> ... The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them; such facts - may be proved by extrinsic evidence or appear in recitals ...

So also, in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 WLR 989 Lord Wilberforce said:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise, it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

He continued:

> ... what the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

For reasons which will appear later in this judgment, I am satisfied that at the time he entered into the joint venture agreement, Tan Ah Chim knew that the *modus operandi* of D1 when entering into agreements of that kind was not only to engage D2 to carry out the building construction work but also to rely on D2 to raise the necessary finance by charging its land to banks from time to time. This, in my view, would explain why Clause 22 - perhaps an unusual clause in a building contract - was inserted.

Moreover, as it happens, the conduct of the parties following the execution of the joint venture agreement, reinforces the view, that it was their intention that their rights, title and interest thereunder were to be freely assignable.

We know, for example, that under the joint venture agreement, the vendor Tan Ah Chim had, without the consent of the purchaser D1, entered into an agreement dated 27 August 1978 with his family company, the plaintiff, whereby all his right, title and interest thereunder had passed to the plaintiff. Pursuant thereto, Tan Ah Chim had transferred the land to the plaintiff and had, through his solicitors Ms. Gan Teik Chee and Ho, by letter dated 22 May 1979, merely informed D1 of the same without in any way seeking the latter's consent thereto. This suggests strongly, that Tan Ah Chim, acting no doubt on advice from his solicitors, himself recognised that regard being had to the provisions of Clause 22, he was free to transfer the land which was the subject matter of the joint venture agreement without the consent of D1.

In the same way, I am satisfied upon the evidence before me, that Tan Ah Chim, and thereafter the plaintiff, were aware that building works on what was known as the Green Lane Project (within the building scheme concerned) which fell within the scope of the joint venture agreement were being carried out by D2 ever since August 1977. Indeed, by a letter dated 8 January 1979, (AB 1 p. 32) signed by D1, addressed to, *inter alia*, Tan Ah Chim, with copies, *inter alia*, to Ms. Gan Teik Chee & Ho, D1 gave formal notice of his intention to assign all his rights and obligations under the joint venture agreement to D2.

In reply, Ms. Gan Teik Chee & Ho, by a letter dated 8 February 1979 (p. 45 AB 1) merely asked for the names of the shareholders of D2, their respective shareholdings and their relationship to D1, adding "Mr. Tan Ah Chim is anxious to ascertain whether Real Property Gains Tax is payable." Be it noted, nowhere in the letter was there anything indicating any objection to the assignment nor for that matter did the plaintiff raise any objection when two of their directors had been informed by D2 by letter dated 15 February 1979 that it (D2) would continue with the construction works on the land.

Some three weeks before M/s. Gan Teik Chee & Ho's letter dated 8 February 1979, by a Circular Resolution dated 17 January 1979, signed by all the directors of D2, including D1, it was resolved that D2 do take over completely the rights and obligations of D1 under the joint venture agreement.

Going back a little more, the events immediately preceding the signing of the assignment agreement may be worth mentioning. On 11 November 1978, D1 had resigned as Permanent Managing Director and his eldest son Ooi Kim Keat (DW2) succeeded him as Managing Director. Apparently, the reason for this, according to Ooi Kim Keat, was that D1 had wanted him to learn to manage D2 and also because D1 was no longer interested in the business of D2.

The first indication of objection being taken by the plaintiff to the alleged assignment was by

letter dated 11 October 1979 (AB 1 p. 112), no reason for the objection being assigned. It was said that the objection was the result of instigation on the part of D1 who had by now fallen apart badly with members of his family who were on the board of D2 (including his wife Ong Heok and his eldest son Ooi Kim Keat, DW2) on account of personal family reasons.

The plaintiff's letter of 11 October 1979 prompted the solicitors for D2 to write to the plaintiff reminding it that the joint venture agreement permitted assignment and asking for reasons for the objection to the assignment. No reply having been received to this letter, D2's solicitors wrote another letter dated 29 November 1979 to the plaintiff (AB 1 p. 117) once again drawing attention to the assignment and asking for their approval to it, at the same time offering them various inducements, for example, an undertaking to pay compensation to squatters on the land and to give an indemnity in respect of any claims D1 might have against it arising from liability incurred for delay in the completion of works.

The plaintiff's solicitors then replied by letter dated 11 December 1979 (AB 1 p. 118) stating that the plaintiff could not consider the request for approval of the assignment until their client had discussed the matter with D1 personally.

A subsequent letter by the solicitors for the plaintiff dated 17 December 1979 addressed to D1 (AB 1, p. 120), made it clear that it was the confirmation of D1 to the assignment which the plaintiff was concerned about for it ended with the following two paras:

> The purported assignment obviously cannot be accepted without your unequivocal consent as there was previous disclaimer by you of a similar assignment.
>
> It would be in the interest of all parties to settle the outstanding disputes so that construction of the 8 houses abovementioned can be completed and the building scheme proceeded with without further delay.

It was obvious from the evidence before me that D1 had disclaimed the assignment because he alleged that he had not been paid the consideration of RM60,000 mentioned therein. This allegation by D1 must, however, be tested against certain background facts particularised by Counsel for D2 in his written submission at p. 27 concerning the course of dealings between D1 and D2 in the construction field, including the financial assistance rendered by D2 to D1 by raising loans from banks upon the security of charges over D2's lands. It was said that there had been various building projects carried out by D2, upon the request of D1, and for his benefit, in respect of which D1 had collected millions of dollars from purchasers with the result that D1 owed and still owes substantial sums of money to D2.

In particular, it was said that upon D1's own admission, as at 30 September 1978, D1 owed to D2 the sum of RM460,822 and that as at 31 December 1978, D1 owed to D2, the sum of RM375,822. Having regard to the evidence, I accept that the admissions by D1 are true.

To return to the specific issue as to whether D2 had paid to D1 the consideration of RM60,000 referred to in the assignment agreement, it is true that at first glance it appears from the bank statements, that the RM60,000 was not paid by D2 to D1 but reflection reveals that it was in fact paid as evidenced by the relevant entries in the books of account of D2 which entries I find were made upon the instructions of D1, as well as the oral evidence thereon of Ooi Kim Keat, whose testimony on this point I accept. These entries reveal that in the books of D2, in respect of the account of D1, credit had been given to D1 thereby reducing his total outstandings to D2 in the manner particularised at pp. 29 and 30 of the written submission of Counsel for D2.

In this context, an issue arose as to whether Ooi Kim Keat had the authority to sign the second of the two receipts dated 26 January 1979 and 14 June 1979 for RM53,023.54 and RM6,976.46, respectively, (see p. 92 AB 1) on the ground that the General Power of Attorney dated 14 April 1975, being Ex. D57, given by D1 to Ooi Kim Keat, had allegedly been revoked by the Notice of Revocation dated 14 February 1979, being Ex D16. However, Clause 26 of the Power of Attorney, consistently with s. 161 of the Contracts Act 1950, (Revised - 1974) provides that the Notice of Revocation to be effective, had to be received by Ooi Kim Keat. Upon the evidence, I accept that up to 31 December 1979, Ooi Kim Keat had not received the Notice of Revocation. I therefore find, as a fact, that Ooi Kim Keat was authorised to sign both the receipts on behalf of D1.

It follows, therefore, and I so find, that:

(1) the parties to the joint venture agreement were free to assign their rights and obligations thereunder; and

(2) the assignment agreement was made for the stipulated consideration of RM60,000 which D1 had duly received in full from D2.

The assignment agreement was thus a perfectly valid in law and I so hold.

Consequently, I must also hold that D1 had no right to rescind the assignment agreement and therefore it is unnecessary for me to consider the further submission of Counsel for D2 that the notice of rescission of the assigment agreement sent by D1 to D2 was ineffective because it was never proved that such notice was received by D2 but, had it been necessary for me to do so, I would hold that there was no evidence or no sufficient evidence of such receipt. And, that in any event, such notice ought to have been, but was not served upon the receivers and managers of D2.

If, contrary to my view, upon a proper construction of the joint venture agreement, and in particular clause 22 thereof, the parties thereto were not at liberty to assign their rights thereunder, without the express consent of the other, as contended by Counsel for the plaintiff, then I must go on to consider, whether Tan Ah Chim, and therefore the plaintiff, had waived the condition against assignment or, alternatively, had by their conduct acquiesced, in D2 stepping into the shoes of D1 for purposes of carrying out the Green Lane Project.

Now, what do waiver and acquiescence mean?

By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right (*Keene v. Biscoe* [1876] 8 Ch. D. 201, at p. 203). A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver in this sense, depends upon consent (*Selwyn v. Garfit* [1888] 38 Ch. D 273, CA, at p. 284), and the fact that the other party has acted upon it is sufficient consideration (*Stokoe, Ex parte Moore* [1876] 2 Ch. D. 802, CA).

By definition, acquiescence is used in two senses. Strictly, it implies that a person abstains from interfering while a violation of his rights is in progress (*Duke of Leeds v. Earl of Amherst* [1846] 2 Ph. 117, at p. 124). It could also imply that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice.

First of all, I must record my finding, that upon the evidence before me, having regard to the track record of D2, (incorporated on 16 January 1974) in regard to which extensive references have been made by Counsel for D2 in his written submission at pp. 8/12, that D2 was and is a competent building contractor and has been and is known as such by those in the construction field, in Penang, including the plaintiff.

Secondly, it was contended by Counsel for D2, and I agree, that the *modus operandi* of D1 was to enter into joint venture agreements with landowners and then not only to engage D2 to carry out the building construction works but also to rely on D2 to raise the necessary finance by charging its lands to banks from time to time. This, of course, meant that purchasers of buildings from the developer would pay the purchase price to D1 directly and he in turn would have to pay D2, and it was said, in passing, that as a result of such transactions, D1 owed D2 a sum amounting to RM560,000 as at 31 December 1986 which sum still remains unpaid. No less than 6 examples of such projects were mentioned by Counsel for D2 in his written submission at pp. 10/12, during the period from March 1976 to 1982.

Such a state of affairs which, objectively speaking, must appear strange to anyone with even a modicum of business acumen, is perhaps understandable, bearing in mind that D1 belonged to the old school, was the successful head of a working class Straits born Chinese family, and was the founder of D2, who had by his side his eldest son Ooi Kim Keat. Moreover, D1 was also, at the time the joint venture agreement was entered into by him and Tan Ah Chim on 20 May 1977, the Permanent Managing Director of D2 his family company whose only activity was in the construction field.

Thirdly, I would repeat that at the time of entering into the joint venture agreement on 20 May 1977 with D1, Tan Ah Chim was aware of the *modus operandi* of D1 aforesaid when engaged in joint venture projects in the construction field and, may well explain why clause 22 which allowed the assignment of right, title and interest of the parties, without qualification, had been included.

Fourthly, I must also record my finding that D2 commenced work on the Green Lane Project in August 1977 and that as from 17 January 1979, took it over completely as evidenced by D2's

Circular Resolution dated that day and signed by D1 in his capacity as Director. I further find that at all material times the plaintiff was fully aware of these facts but raised no objection whatever to the works being carried out by D2 and D2 stepping into the shoes of D1, until November 1979 when the plaintiff resorted to physical force to stop D1 from proceeding with the work and, in particular, instigated the assault upon Ooi Kim Keat (DW2) on 26 November 1979, at the site by its servant or agent. (See the Medical Report issued by the Doctor at Penang Medical Centre, D49).

Fifthly, I must also record my finding that as at November 1979, D2 had done a considerable amount of work on the Green Lane Project and the expenditure incurred by it in this regard as appears from the uncontradicted Audited Accounts (Ex D19 p. 5) and the Report of its Chartered Quantity Surveyor, being Exhibits D68 and D69 (which I accept as being in no way improbable), amounted to RM440,772. This figure is also supported by D2's Ledger for the period 1978 to 1979 being Exhibits D73 (A) and D73 (B) which had been auditted by the Receivers and Managers of D2 appointed by the Court by Order dated 13 February 1980, which show that the sum expended on the Green Lane Project by D2 amounted to RM444,209.09.

And, as for the year ended 30 November 1980, the uncontradicted audited accounts of D2 prepared by the Accountants Peter Chong, being Ex D60 at p. 5, which I accept as being in no way improbable, under the heading "Work in Progress" show that the sum expended by D2 on the Project amounted to RM557,813.

Similarly, the uncontradicted Audited Accounts of D2 prepared by the Accountants Cheah Khye Chuan for the year ended 30 September 1985, being Ex D61 at p. 8 under the heading "Development Property", which I also accept as being in no way improbable, show that the sum expended by D2 on the project amounted to RM587,778, the increase over the sum shown in the audited accounts for the year ended 30 November 1980 being attributable to outgoings.

Other evidence corroborating the fact that works on the Green Lane Project had in fact been carried out by D2 which was uncontracdicted and which I accept as being in no way improbable, consisted of the following:

(1) A receipt dated 1 August 1979 issued by Chartered Architects Yoong & Associates in favour of D2 in the sum of RM6,050 (See Ex D50).

(2) Letter dated 5 March 1980 from the Consultant Engineers to D2, stating their consultation fees for the Green Lane Project. (See Ex D51).

(3) Letter dated 29 February 1980 from Consultant Engineer Jurujaya Sdn. Bhd. addressed to D2, copy to J.K.R. Penang and Chartered Architects Yoong & Associates.

(4) Letter dated 3 October 1980 addressed to D2. (See Ex D52).

(5) Receipt dated 31 March 1983 issued by the Architects Yoong & Associates in favour of D2 for RM2,000. (See AB 1 P. 153).

(6) The testimony of Mr. Gan Teik Chee that all works concerned were carried out by D2 as a vehicle for D1.

On the other hand, D1 did not adduce a scrap of evidence to show that he had done any work on the Green Lane Project though Counsel had, on his behalf, said that he would do so. It would be reasonable therefore to infer that no such evidence was produced simply because there was none.

Having regard to my findings aforesaid, the plaintiff's claim that upon a proper construction of the joint venture agreement, D1 was not entitled to transfer to D2 his rights, title or interest thereunder without the consent of plaintiff, even if well founded, was barred by waiver and acquiescence.

Before leaving this part of the case I must advert to the attempts by Counsel for the plaintiff to allege fraud, misrepresentation and manipulation of accounts against D2, by way of cross-examination of Ooi Kim Keat, which it was said was relevant as showing that the assignment agreement was not valid in law.

However, neither fraud nor misrepresentation had ever been alleged by the plaintiff in their pleadings - not even generally - although it is settled law that where, it is sought to rely upon a plea based thereon, the allegations relating thereto must be pleaded and particularised, in which case, the onus which lies upon the party making the allegations would be to prove the same beyond reasonable doubt. [See *Saminathan v. Pappa* [1981] 1 MLJ 121; *Lee You Sin v. Chong Ngo Khoon* [1982] 2 MLJ 15]. It is therefore right to say, at the risk of being trite, that on this ground alone the allegations made by way of cross-examination by Counsel for the plaintiffs

and in his submission should be given short shrift and dismissed. But, I consider I should go further and find as a fact, which I hereby do, that the allegations were mere allegations and totally unsupported by the evidence.

I now turn to consider the second key issue: whether it was the plaintiff or D2 who were in breach of the joint venture agreement.

As to Question 2: It was freely admitted by Tan Weng Joo (PW.1) on behalf of the plaintiff, that the plaintiff had stopped D2 from working and indeed had evicted D2 from the site on or about 26 November 1979 as the plaintiff had nothing to do with D2. The Managing Director of D2 Ooi Kim Keat, had gone further and alleged that he had been physically assaulted on that day at the site, by a man with a wooden stick with nails in it, upon the instigation of the plaintiff with a view to bringing work on the site to a standstill. He had made a prompt report to the police complaining of the assault, and was in fact treated at the Penang Medical Centre on that very day for injuries he said he had sustained by reason of the assault. (See the Medical Report dated 19 March 1986, issued by the Penang Medical Centre, being Ex D49, which confirmed his admission on 26 November 1979, and that the injuries on the back of the right shoulder were consistent with their having been caused by nails).

In his written submission, Counsel for the plaintiff did not challenge the fact of the assault but chose merely to mitigate the assault by alleging that it was probably provoked by Ooi Kim Keat. There was, of course, not a scrap of evidence of such provocation, so clearly Counsel's submission was based on pure surmise.

I have already found as a fact that a servant or agent of the plaintiff had indeed assaulted Ooi Kim Keat. I further find that the object of the assault was to bring work on the site to a standstill. My reasons for these findings are that there is nothing improbable in the testimony of Ooi Kim Keat as regards this part of the case and, I would add, he stood up well to cross-examination.

It would be convenient if, at this point, I adverted to the quarrel or falling apart, as I put it earlier, between D1 on the one side and his wife Ong Heok (since deceased) and their children on the other side - a quarrel which revolved around their rights as directors of the family company D2, the funds and assets in it, the allotment of new shares in it, and other alleged breaches of the Companies Acts 1965, which quarrel had reached the Courts, in the form of a civil suit, being Penang High Court Civil Suit No. 66/80. Arising out of that suit, Ong Heok had on 13 February 1980 succeeded in obtaining an *exparte* interlocutory injunction restraining D1 from acting as director of D2, from dealing with the funds or using the seal of D2 or dealing in any manner with the properties or assets of D2 or otherwise interfering with the management of D2 and appointing a receiver and manager to carry out his duties until the trial of the action.

An application by motion was then made by D1 and his co-defendants to set aside the writ of summons and all subsequent proceedings for irregularity; the real purpose of this application being to obtain an order discharging the injunction.

In the event, the application for discharge of that injunction, was dismissed by Gunn Chit Tuan, J. (as he then was) on various grounds which appear from his judgment reported in the Malayan Law Journal under the name of *Ong Heok & Anor. v. Ooi Bee Tat & Ors.* [1982] 2 MLJ 326.

Arising from all this, the point worth noting is that the receivers and managers of D2, appointed by the Order of Court dated 13 February 1980, had attempted to proceed with the construction work on the site, but by a letter dated 21 March 1981, addressed to their solicitors, Ms. Lim Kean Chye & Co., the plaintiff had opposed the attempt on the ground that the plaintiff had nothing to do with D2. (See AB 1 pp. 140/141).

This caused Ms. Lim Kean Chye & Co. to write to the solicitors for D2, Ms. Presgrave and Matthews, and to the solicitors for the plaintiff, Ms. Gan Teik Chee & Ho, a letter dated 16 May 1981 (Ex D39), in the following terms:

16 May 1981.

M/s. Presgrave & Matthews,
Advocates & Solicitors,
Penang.

M/s. Gan Teik Chee & Ho,
Advocates & Solicitors,
Penang.

Dear Sirs,

Ooi Bee Tat & Sons Sdn. Bhd.
Propose 25 Double-storey terrace

houses and propose 9 Double-storey detached houses on Lot 70 Green Lane

We shall be obliged to know what is going to happen to the proposed buildings. As you realize the receivers and managers cannot do anything of their own will and must know your attitude so that either one of you will apply to Court for the projects to continue. Please let us have your immediate reply because there are pressing problems with the Majlis Perbandaran Pulau Pinang.

Yours faithfully,
Sgd.
Lim Kean Chye & Co.

Ms . Gan Teik Chee & Ho then replied by their letter dated 30 May 1981 (Ex D40), in the following terms:

Penang 30 May 1981.

GTC/0/90/77/LV
DH/23

M/s. Lim Kean Chye & Co.,
Advocates & Solicitors,
14, Penang Street,
(Tingkat Satu),
Penang.

Dear Sirs,

Proposed Housing Scheme on Lot 70, T.S.5 NED Penang

With reference to your letter of 16 May 1981 our client instructs that the company has nothing to do with the above housing scheme as the joint-venture contract is between the landowners and our client Ooi Bee Tat.

Yours faithfully,
Sgd.
Gan Teik Chee & Ho

M/s. Presgrave & Matthew, Advocates & Solicitors, Penang.

Tan Ah Chim & Sons Sdn. Bhd. ,
42, Green Lane T. S. 5,
Penang.

As a result, Ms. Lim Kean Chye & Co., as solicitors for the receivers and managers of D2, had applied to the High Court, Penang, seeking directions as to the Green Lane Project the subject matter of the joint venture agreement.

Upon the hearing of this application on 20 September 1982, wherein the receivers and managers of D2 were represented by Mr. Lim Kean Chye, D1 by Mr. Gan Teik Chee and D2 by Mr. N. G. Sivanandhan, Gunn Chit Tuan, J. (as he then was) ordered that D2 was to continue the construction work on the Green Lane Project.

Notwithstanding that order of Court, the plaintiff had refused to allow the receivers and managers of D2 to continue with the construction work on the Green Lane Project and, Mr. Gan Teck Chee had continued to act for D1 in the matter of the settlement agreement in writing dated 20 July 1982 (Ex AB1 P142) entered into by the plaintiff and D1, whereby D1 was to carry out the Green Lane Project himself and that for this purpose time for completing the same as provided for in the joint venture agreement be extended by a period of two years and that all claims arising from disputes between the plaintiff and D1 be settled in consideration of the payment by D1 to the plaintiff of the sum of RM250,000. D2 was kept in the dark about this settlement agreement.

Clearly, the settlement agreement of 20 July 1982 was inconsistent with the order of Gunn Chit Tuan, J. (as he then was) dated 20 September 1982 whereby D2 had been authorised to continue with the construction work on the Green Lane Project.

Although Mr. Gan Teik Chee had appeared only on behalf of D1 at the hearing before Gunn Chit Tuan, J. (as he then was) on 20 September 1982 when the order was made, there is, nevertheless, the evidence of the Managing Director of the plaintiff Mr. Tan Weng Joo that he (Mr. Gan Teik Chee) had in 1982 and 1983, been advising the plaintiff in the matter of the settlement agreement dated 20 July 1982 (AB 1, p. 142). His evidence on this point is corroborated by the letter P 31 dated 6 October 1982, signed by Mr. Gan Teik Chee and addressed to the plaintiff which reads as follows:

6 October 1982.

GTC/0/90/77/G

A.R. REGISTERED

Tan Ah Chim & Sons Sdn. Bhd.,
No. 42, Green Lane (T.S. 5),
Penang.

ATTENTION: MR. TAN WENG JOO

Dear Sirs,

Sale Agreement Dated 20 May 1977
In Respect Of Lot 70 Town Subdivision 5, North East District, Penang

We refer to the above matter and your letter of 20 July 1982 to Mr. Ooi Bee Tat @ Ooi Bee Lee,

regarding which you promised to let us have a certified copy of Resolution authorising the settlement of the dispute in respect of the above sale agreement.

Please let us have a certified copy of the above Resolution as soon as possible.

Yours faithfully,
Sgd.
Gan Teck Chee & Co.

c.c.
Mr. Ooi Bee Tat @ Ooi Bee Lee
No. 136-E Jalan Rambutan
Air Itam
Penang.

Having regard to this evidence, it was contended by Counsel for D2 that Mr. Gan Teik Chee who had acted for D1 in the matter of the settlement agreement dated 20 July 1982 (AB1 p. 142) entered into by the plaintiff and D1, ought to have informed the plaintiff of the order of Gunn Chit Tuan, J. (as he then was) dated 20 September 1982 whereby D2 had been authorised to carry on the Green Lane Project.

Mr. Gan Teik Chee who was called by D2 said that he was under no duty to inform the plaintiff as aforesaid. In my view, he was under such a duty as an officer of the Court. The settlement agreement was overidden by the order of the Court dated 20 September 1982 made in proceedings in which Mr. Gan Teik Chee had represented D1.

Although the plaintiff's case was that it did not know of the order of Court dated 20 September 1982 at the material time, the knowledge of their solicitor Mr. Gan Teik Chee of the same, must be imputed to the plaintiff. [See *Doshi v. Yeoh Keong Lay* [1975] 1 MLJ 85 at p. 88 FC.

The point about which complaint had been made by Counsel for D2, is that notwithstanding the order of Court dated 20 September 1982, the plaintiff and D1 continued to deal with each other with a view to D1 carrying out the construction works on the Green Lane Project. It seemed to me that Counsel had considerable justification to do so, as a *prima facie* case of contempt of Court, was made out.

There is another point which has occurred to me regarding this part of the case and this is that there appears nothing in the judgment of Gunn Chit Tuan, J. (as he then was) referred to earlier, to suggest that Mr. Gan Teik Chee who appeared before him on behalf of D1 in the proceedings held on 20 September 1982 which led to that judgment had directed the attention of the Court to the existence of the settlement agreement dated 20 July 1982 entered into by the plaintiff and D1. If, in fact, there was no such disclosure then, in my view, the non-disclosure was in respect of a matter which it was material for the Court to know. I say nothing more about the matter as it does not appear that Mr. Gan Teik Chee had been cross-examined on this point.

In my view, the settlement agreement - which incidentally fell through because of the inability of D1 to fulfill his financial obligations thereunder though D1 sought to camouflage this by the excuse that there was no resolution by the plaintiff's board authorising the settlement - was nothing more than a concerted attempt by the plaintiff and D1 to exclude D2 from the Green Lane Project, in contravention of the assignment agreement entered into by D1 and D2. I therefore do not consider that what Counsel for the plaintiff has termed "the admission therein (the settlement agreement) that D1 was in breach of the 1977 agreement for which the RM250,000 was to be paid by way of damages", should be given any weight at all. In any event, the so called admission was, in no way binding upon D2 who was not a party to the settlement agreement.

I must next mention the final order dated 25 January 1983 made in CS 66/80 (AB 1 p. 149), in particular, Clause 5 thereof, which provided that the appointment of the receivers and managers shall continue until the EGM of D2. Pursuant to this part of the final order, an EGM of D2 was held on 1 March 1983, whereat it was resolved, *inter alia*, that the receivers and managers be requested to return the management of the affairs of D2 to its board.

Following the EGM of 1 March 1983, D2 wrote a letter dated 11 June 1983 to the plaintiff, requesting the plaintiff to allow D2 to complete the building project and, at the same time, mentioning that D2 in furtherance of its desire to complete the project, had on 31 March 1983 paid the fees of the Chartered Architects Yoong & Associates (see AB 1, pp. 154 and 155) and had also on 11 June 1983 written to D1 inviting his co-operation as director of D2 (as appears AB 1 pp. 156, 157), but to no effect.

Then, on 4 September 1984, the High Court, Penang, entered a consent order in CS 66/80,

whereby it was ordered that D1 do relinquish his position as Permanent Managing Director of D2 and do refrain from interfering in the management and business activities of D2. (See AB 1, pp. 156 and 157). However, D1 chose to ignore the same as emphasised by the position he has taken in the present proceedings.

It would be convenient if, at this stage, I referred to the obligations of the parties under the joint venture agreement in broad outline.

The building scheme in the Green Lane Project was to be carried out in two phases - Phase 1 to be completed in 18 months of vacant possession being given of the lands comprised therein and Phase 2 to be completed within 18 months of vacant possession being given of the lands comprised therein. (See Clauses 8, 9 and 10 at pp. 7 and 8 of AB 1).

On the other hand, the plaintiff's obligation was to give vacant possession of the lands comprised in Phase 1 within 18 months of the date of the joint venture agreement that is to say, on or before 20 November 1978, and vacant possession of the lands comprised in Phase 2 within 30 months of the date of the joint venture agreement, that is to say , on or before 20 November 1979.

In order to give vacant possession of the lands comprised in Phases 1 and 2 as aforesaid, the plaintiff had incurred the obligation of clearing certain occupants on the lands by the payment of compensation.

In the event, as was admitted by Mr. Tan Weng Joo on behalf of the plaintiff, vacant possession was never given by the plaintiff as required under the joint venture agreement; he admitted that in so far as Phase 1 was concerned, it was given only as late as 3 April 1981.

In this context, it is worth noting that by the consent order dated 15 October 1980, (see AB 1 pp. 138/139) delivery of vacant possession was to be effected on or before 15 April 1981.

Other admissions by Tan Weng Joo worth mentioning are that in November 1979, the plaintiff, by its servants or agents, had prevented D2 from carrying on the building works and, subsequently, between 1980 and 1983, continued to prevent the receivers and managers of D2 from doing so, and after 11 June 1983, had continued to prevent D2, from doing so.

D1's version regarding this part of case was this. Tan Ah Chim had wanted construction works on Phase 1 to commence in August 1977 and had affirmed his intention to give vacant possession as required under the joint venture agreement. This necessitated clearing 9 occupants on the land. However, by 15 July 1981, there were still occupants on the land (See Ex D4) and the position was complicated by the presence of a wooden hut on the land constructed by a relative of Tan Ah Chim. Then, sometime in 1982, Tan Ah Chim died.

It was argued by Counsel for the plaintiff that there was a waiver of the requirement under the joint venture agreement as to the giving of vacant possession of the lands concerned by the plaintiff when D1 proceeded with the construction work before the plaintiff yielded vacant possession of the site.

In this context, it is useful to bear in mind what Isaacs J. said in *Craine v. Colonial Mutual Fire Insurance Co. Ltd.* [1920] 28 CLR 305 (High Ct. of Aus.) at p. 327:

> ... we are bound here to limit the word 'waiver' to its own strict legal connotation. 'A waiver must be an intentional act with knowledge' (per Lord Chelmsford LC in *Earl of Darnley v. (Proprietors etc.) of London, Chatham & Dover Railway*, [1867] LR 2 HL 43, at p. 57. First, 'some distinct act ought to be done to constitute a 'waiver' [per Parke B. in *Doe d. Nash v. Birch* [1836] 1 M & W 402, at p. 406 and per Williams J. in *Perry v. Davis* [1858] 3 CB NS 769, at p. 777]; next, it must be 'intentional', that is, such a either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred; and, lastly, it must be 'with knowledge', an essential supported by many authorities, from *Pennant's* case [1596] 2 Co. Rep., 171, at p. 173 and down to *Matthews v. Smallwood* [1910] 1 Ch. 777. "Waiver" is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions [See per James LJ. in *Pilcher v. Rawlins* [1872] 7 Ch. App. 259, at pp. 268 *et seq.*] It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from 'reprobating' - in English terms, whether he has elected to get some advantage to which he should not otherwise have been entitled, so as to deny to him a later election to the contrary (See per Lord Shah in *Pitman v. Crum Ewing* [1911] AC 217, at p. 239. His knowledge is necessary, or he cannot be said to have approbated or elected.

Counsel for D1 had argued, that by commencing work before vacant possession of the site was given D1 had not intended to waive or, perhaps more accurately, he had never intended to release Tan Ah Chim and it follows, his successor in title, the plaintiff, from the obligation to provide vacant possession of the lands concerned within the time limited under the joint venture agreement. In particular, it was argued that D1's intention was merely to expedite progress of construction work and that he did so at the behest of Tan Ah Chim; in other words, D1 never intended to throw away his rights under the joint venture agreement.

Considering that it was admitted by the plaintiff that relations between Tan Ah Chim and D1 were more than cordial, I am inclined to agree with this part of the submissions of Counsel for D1. Accordingly, applying the principles enunciated by Isaacs J. in *Crave v. Colonial Mutual Fire Insurance Co. Ltd. (Supra),* I hold that there was no waiver as contended for on behalf of the plaintiff because D1 never intended to release or not to assert his right.

I would, at this stage, touch upon the Notice issued by the Building Department of the Majlis Perbandaran, Pulau Pinang, (AB 1 p. 35) dated 23 January 1979 addressed to the contractor on site requiring the stoppage of construction work on the Green Lane Project because there were no approved building plans. In fact, however, building plans had been approved on 10 December 1976 and 3 October 1978 (see D 48A, D 48C and D 48D) and, according to Ooi Kim Keat, whose evidence on this point I accept, when this was explained to the officer who issued the Notice one Mr. Chooi, the latter indicated construction work on the project could proceed. Nothing therefore turns on the Notice issued by the Building Department of the Majlis Perbandaran, Pulau Pinang.

Next, I would touch upon the plaintiff's allegation that the building works carried out on the Green Lane Project were seriously defective. I note, however, that no evidence whatsoever had been adduced on behalf of the plaintiff in support of this averment although Counsel for the plaintiff had categorically stated that he would be calling expert evidence in support of the same. The only other point worth mentioning as regards this part of the case is the letter of complaint by the Consultant Engineers dated 22 January 1979 (AB 1 p. 34) but this related merely to "form work", which was in fact subsequently replaced.

Nor, for that matter, did the plaintiff adduce any evidence; for example, by the calling of experts to prove its allegation that it had suffered damage by reason of the alleged breaches by the defendants or either of them. [See *Popular Industries Ltd. v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360, at 367 col 1 D to H.]

It was perfectly obvious, therefore, that the plaintiff was in breach of contract from beginning to end and was wholly to blame for causing construction work on the Green Lane Project to grind to a halt and I so find.

So far as the plaintiff's claims against D1 are concerned, regard must **also** be had to my conclusions as to the interpretation of Clause 22 of the joint venture agreement and the validity of the assignment agreement whereby D1 had assigned his rights and obligations under the joint venture agreement to D2. That being so, s. 42 of the Contract Act 1950, which provides that,

> when the promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor

applies in favour of D1. [See *Letchumi Ammal v. Nam Fong Housing Sdn. Bhd.* [1982] 2 MLJ 19. The plaintiff's claims against D1 must, therefore, be dismissed with costs and I so order.

For the same reasons, D1's counterclaim against the plaintiff has no legal basis and must also be dismissed but with no order as to costs, since I consider that a great deal of the Court's time was taken up in considering issues which eventually were decided against the plaintiff.

So far as the plaintiff's claims against D2 are concerned, it goes without saying, that having found that there was a valid assignment by D1 to D2 of his obligations under the joint venture agreement, and having found that the plaintiff was in breach of contract from beginning to end and was wholly to blame for causing the construction work on the Green Lane Project to grind to a halt, its claims against D2 must, likewise be dismissed with costs, and I so order.

I must now consider the counterclaim of D2 against the plaintiff to which I have made reference earlier on in this judgment.

First of all, it would be pertinent to refer to the following provisions of the Specific Relief Act, (Revised - 1974), which deserve reproduction in full:

s. 11(1) Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced -

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;
(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

(2) Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

s. 18(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

(2) If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

s. 22 Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by -

(a) any party thereto;
(b) the representative in interest, or the principal, of any party thereto:

Provided that, where the learning, skill, solvency, or any personal quality of the party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed;

20(1) The following contracts cannot be specifically enforce:

(a) a contract for the non-performance of which compensation in money is an adequate relief;
(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;
(c) a contract the terms of which the Court cannot find with reasonable certainty;
(d) a contract which is in its nature revocable;
(e) a contract made by trustees either in excess of their powers or in breach of their trust;
(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of the company, which is in excess of its powers;
(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date; and
(h) a contract of which a material part of the subject matter supposed by both parties to exist, has, before it has been made, ceased to exist.

(2) Save as provided by the law relating to civil procedure, no contract to refer a controversy to arbitration shall be specifically enforced.

21(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

(2) The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

(a) where the circumstances under which the contract is made are such as to

give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part; and

(b) where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

(3) A case in which the Court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

In *Ooi Hock Lai & Anor. v. Lee Kok Leong* [1990] 1 CLJ 951 which was a purchaser's action for specific performance of a contract for sale of land and the construction of a house thereon where each party blamed the other of having committed a breach of contract, by the defendant, Lim Beng Choon, J. had occasion to consider most of the provisions aforesaid, and having scrutinised the evidence with a view to determining the nature of the breaches alleged, the circumstances under which the alleged breaches occurred and whether it was the plaintiff's act or conduct that had evinced an intention not to be bound by the agreement, concluded that the plaintiff was entitled to an order for specific performance **and damages** and a declaration that the defendant's purported rescission of the contract was null and void.

Jones and Goodhart on **Specific Performance,** [1986] at p. 20 have this to say:

> The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that the parties have agreed that damages are an adequate remedy or that one party has an option to pay or perform (See *Howard v. Hopkyns* [1742] 2 Atk 371; *Crutchley v. Jerningham* [1817] 2 Mer 502; *Long v. Bowring* [1864] 33 Beav 585; *Robb v. Green* [1895] 2 QB 315. Exceptionally, the Court may reach the opposite conclusion: *Leogh v. Lillie* [1860] 6 H & N 165; specific performance will nonetheless be granted if it is the appropriate remedy. Conversely, if the parties stipulate that specific relief should be the remedy, it is a recognition that they regard damages as inadequate; but this does not oust the Court's discretion to refuse specific relief if it thinks damages are in fact an adequate remedy. [See *Warner Bros v. Nelson* [1937] 1 KB 209 at 220-21, per Branson J.]

In principle, therefore, the Court has a discretion to order specific performance **and** decree damages in favour of a party. Land is always deemed to have a special value the loss of which may not be adequately compensated by damages. The evidence adduced also discloses that D2 had put in a tremendous amount of work and labour and also expended considerable sums of money in discharge of its obligations under the joint venture agreement until they were wrongfully and without just cause excluded from the site by force of arms, as it were, by agents or servants of the plaintiff. There is, therefore, considerable justification for invoking the doctrine of substantial performance in favour of D2, and I so hold.

In *Jania Beevi v. Govindaswami* [1967] AIR Mad 369, it was held that where the subject matter of the agreement consisted of a partly completed building and the agreement itself did not contain specific details relating to the proposed construction, the Court might grant specific relief.

In *Low Lup Piow & Ors. v. Lee Soh Hua* [1983] 1 MLJ 304, a purchaser's action for specific performance in respect of a contract for the sale and purchase of land at a price of RM700,000 which the plaintiff had intended to develop, the High Court, apart from decreeing specific performance, had ordered the defendant to pay RM50,000 damages for wrongful termination of the contract after taking into consideration the fact that it was well over five years since the defendant broke the contract thus bringing the plaintiff's development project to a standstill for several years.

In all the circumstances, I consider that this is an appropriate case where I must not only decree specific performance but also award compensatory damages, in favour of D2.

More particularly, as regards relief by way of specific performance and injunction I decree in favour of D2 against the plaintiff as follows:

(1) An order for specific performance requiring the plaintiff to carry out the terms and conditions of the joint venture agreement and, in furtherance thereof, to permit D2, as successor in title and/or assignee of D1 thereunder, to carry out its obligations and to invoke its rights thereunder; and

(2) An injunction restraining the plaintiff by itself, its members, servants or agents

from preventing or interfering with the construction work or any part thereof to be continued by D2, its members, servants or agents.

I next turn to consider the quantum of damages both actual and consequential, which I should decree in favour of D2 against the plaintiff.

In assessing the quantum of damages, I must fall back on the broad fundamental principles as to damages enunciated by Lord Blackburn 112 years ago in *Livingstone v. Rawyards Coal Co.* [1880] 5 App Cas 25 who said that the measure of damages is:

> that sum of money which will put the party who has suffered, in the same position he would have been if he had not sustained the wrong for which he is getting the compensation or reparation.

Secondly, I must consider the question what is the material date at which damages, fall to be assessed; is it the date of the breach or the date of the hearing? Since an integral part of the joint venture agreement concerned land and the construction of dwelling houses and shophouses thereon, and as D2 had refused to accept the plaintiff's wrongful repudiation but chose to keep the contract open and alive, it would be obviously unjust to assess damages at the date of the breach. Instead, I would adopt the date of the hearing as the appropriate date for the assessment of damages. [See *Johnson v. Agnew* [1980] AC 367 per Lord Wilberforce at p. 401 A to C; *Radford v. De Froberville* [1977] 1 WLR 1262.]

Thirdly, I have kept in the forefront of my mind certain well established principles in the field of building contract claims, they are conveniently distilled for me by Vincent Powell-Smith and John Sims in their well regarded book on **Building Contract Claims** (2nd Edn.) at pp. 136, 137 & 144 as follows:

(1) Loss of profit normally to be expected, which the contractor would otherwise have earned but for delay or disruption, is an allowable head of claim under the rule in *Hadley v. Baxendale* [1854] 9 Ex p. 341.

(2) However, a contractor would not be entitled to recover an exceptionally high profit on another contract unless this fact were known to the employer at the time the delayed or disrupted contract has been entered into. [See *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB p. 528.]

(3) Additional expenditure on labour, materials or plant due to increases in cost during a period of delay is an allowable head of claim.

(4) The correct measure would be the difference between what the contractor would have spent on labour, materials and plant and what he has actually had to spend over the whole period of the work as a result of the delay and disruption concerned.

Also relevant to this part of the case is what Megaw, J. (as he then was) said in *Wraight Ltd. v. P.H. & T. (Holdings) Ltd.* [1968] 13 BLR 27, a case where a contractor had made a successful claim for loss of profit:

> In my judgment, the position is this: *prima facie*, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would have made if the contract had been performed, less the money which has been saved to them because of the disappearance of their contractual obligation.

Commenting on this passage in the judgment of Megaw J., Vincent Powell-Smith and John Sims have this to day at p. 137 of their book:

> The judge's reference to 'those sums of money which they would have made' is important, since it shows that what is recoverable is the actual profit on the particular contract, whether that is a greater or lesser profit than might normally be anticipated in the industry at large.

I now turn to examine the expert evidence adduced on behalf of D2 on the question of quantum.

As regards the quantum of damages sought by D2 against the plaintiff under its counterclaim, D2 had relied upon the reports of its Chartered Quantity Surveyor Mr. Saw Soon Kooi of Kuantitibina Sdn. Bhd. (D69) dated 14 August 1991 and Registered Valuer Mr. Long Tian Chek of KGV & Associates (AB 2 pp. 112/127 dated 21 August 1985) which had been included in the agreed bundle of documents subject to cross-examination. In the event, these experts were called and cross-examined by Counsel for the plaintiff but they emerged unscathed and their evidence uncontradicted. On the other hand, for the plaintiff neither expert reports nor expert oral evidence had been adduced although

Counsel for the plaintiff did say that expert evidence would be called.

D2's Quantity Surveyor was undoubtedly competent in his field for he was not only well qualified but also highly experienced. His terms of reference appear at pp. 3 and 10 of D68 and at paras 1 and 2 of D69.

He stated that he had visited the site between 15 July 1985 to 3 August 1985 and again on 14 July 1991.

He estimated the costs of completing the works as at June 1991 at RM2,110,080.

He concluded, for reasons, which appear sufficiently in his report, D68 at pp. 3 and 10 and in D69 paras 1 and 2, that the estimated cost of completing the works, including remedial works, as at June 1991 was RM2,110,080.

Similarly, D2's Chartered Valuer Mr. Long Tian Chek, concluded for reasons which appear sufficiently in his Main Report (pp. 121 to 122 Ex AB 2), that the total value for the houses and shophouses on completion as at 1 June 1991 was RM6,245,000. [See also his Supplementary Valuation Report dated 21 August 1985 (D75).

I accept the testimony of both D2's Chartered Surveyor Mr. Saw Soon Kooi and Chartered Valuer Mr. Long Tian Chek as well as their reports, as the same were uncontradicted and they stood up well to cross examination. Moreover, I found nothing improbable either in their testimony or their reports.

More particularly, as regards reliefs by way of damages both actual and consequential, I decree in favour of D2 against the plaintiff as follows:

(i) The cost to complete the project in June 1991 including the remedial works (See D69, p. 3)	RM2,110,080.00	
Less		
Had vacant possession been given by the plaintiff in accordance with the joint venture agreement, without interruption of work, the project would probably have been completed in 1980 (See D68 p. 29 paragraph 10.01) in which case the costs would have amounted to	RM1,213,972.68	RM896,107.32
Plus		
(ii) The prices which the houses and shophouses (only 28 of which D2 would be entitled to under the joint venture agreement) would most probably have fetched in 1980. (See the Valuer's Main Report AB 2 p. 124).	RM6,082,000.00	
Less		
Had vacant possession been given by the plaintiff in accordance with the joint venture agreement, without interruption of work, the project would most probably have been completed in 1980 and the cost would most probably have been (which sum includes the sum of RM497,813, that is, the sum of RM557,813 mentioned at p. 5 of exhibit D60, less RM60,000, being the consid eration under the assignment agreement paid by D2 to D1)	RM1,213,972.86	
		RM4,868,027.14

I next turn to consider D2' s claim for interest on damages against the plaintiff.

The statutory power of the Court to award interest is governed by s. 11 of the Civil Law Act 1956, which is as follows:

> 11. In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> (a) shall authorise the giving of interest upon interest;
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money. [See *The London, Chatham & Dover Railway Co. v. The South Eastern Railway Co.* [1893] AC 429.

As to the appropriate rate of interest, as noted in my judgment in *Lim Yak Hua v. Eastern Oriental Hotel [1951] Sdn. Bhd.* [1988] 3 MLJ 151, there are several different rates to choose from depending upon the particular circumstances of each case. In the present case, D2 had

chosen the judgment debt rate of 8 per cent per annum. So far as the claim for interest on damages for the pre-judgment period is concerned, Counsel for the plaintiff has chosen to say nothing as regards this issue.

I consider that the judgment debt rate of 8 per cent per annum chosen by D2 for the pre-judgment period is not an unreasonable one and I therefore adopt the same.

The next question is, what is the pre-judgment period for which interest should be paid. This period, according to D2 should commence from 1 January 1981, since the expert evidence adduced by D2 established that had vacant possession been given by the plaintiff in accordance with the joint venture agreement and had there been no interruption of work, the project would probably have been completed by the end of 1980. I accept this expert evidence as it was uncontradicted and I found nothing improbable in it.

In the circumstances, I hold that pursuant to s. 11 of the Civil Law Act 1956, D2 is entitled to recover interest on the damages aforesaid at the rate of 8% p.a. from 1 January 1981 to the date of judgment and, pursuant to O. 42 r. 12 of the Rules of the High Court, 1980, further interest thereon at the aforesaid rate from date of judgment to the date of payment, and I so order.

Finally, the plaintiff must also pay to D2 the costs of the action.

Having heard leading Counsel for D2 and the plaintiff further, I made a consequential order allowing D2 18 months, from the date of approval of building plans by the relevant authorities or from the date when the vacant possession of the sites concerned are given by the plaintiff to D2, whichever is the later, in order to complete the project pursuant to the joint venture agreement.

By way of postlude, I must mention that as soon as I had read out my draft judgment, and made the consequential order aforesaid in favour of D2, leading Counsel for the plaintiff had submitted that the Court had not taken into account the fact that specific performance having been decreed in favour of D2 against the plaintiff, D2 will be completing the dwelling houses and selling them at present market values.

To emphasise the point, he added that on the other hand the Court had taken into account the difference in the cost of construction, i.e. the RM896,107.32, to determine loss of profits incurred by D2.

What Counsel was driving at was that in assessing D2's claim for loss of profits, there should be brought into account the profits expected to be earned when the dwelling houses are eventually completed and sold, it being **assumed** that such sales would fetch higher profits than would have been the case, had D2 not sustained the wrong for which he is getting compensation or reparation.

He therefore prayed that the Court direct an enquiry as to damages to be held to take into account the above point.

Leading Counsel for D2 replied that no evidence had been called by the plaintiff to support the point now raised by leading Counsel for the plaintiff and the Court could not speculate as to the present selling prices of the dwelling houses.

Junior Counsel for D2 submitted that unlike leading Counsel for D2 at the trial, Counsel for the plaintiff had made no attempt at all to deal with the issue of quantum of damages in his written submissions.

Now, the record of proceedings will show that extensive evidence was adduced on behalf of D2 in the shape of testimony and reports from the Quantity Surveyor Mr. Saw Soon Kooi and the Registered Valuer Mr. Long Tian Chek, yet at no time when they were in the witness box was a single question put to either witness to establish at what prices the buildings concerned might have been sold having regard to the current market prices. Nor, for that matter, was any expert evidence adduced on behalf of the plaintiff on this point although Counsel for D2 had categorically stated that he would be calling expert evidence on the quantum of damages and, indeed, Counsel for D2 had, in his written submission, directed the attention of the Court to this glaring omission. Similarly, in his lengthy written submissions, Counsel for the plaintiff had omitted to deal with the point. It was therefore only after I had read out my draft judgment that for the first time Counsel for the plaintiff sought an order for an enquiry as to damages with a view to establishing the point. The question therefore was whether he should be allowed to do so at this very late stage.

It was manifestly clear, that there had been ample opportunity for the plaintiff to elicit the

point concerned either by way of cross-examination of D2's experts or by adducing evidence in rebuttal in the shape of expert testimony yet advantage was not taken of that opportunity. To have granted the request of Counsel for the plaintiff would have led to an unnecessary prolongation of what was already a lengthy trial with a consequent increase in costs and would have meant giving the plaintiff a second opportunity to prove a point which it had failed to do at the trial.

Furthermore, if the plaintiff was to be permitted to make further investigations and to call further evidence after the Court has pronounced judgment on **all** issues before it, then the rules of procedure would become nugatory.

Accordingly, having considered the submissions of Counsel on both sides and the various factors abovestated, I had, in the exercise of my discretion, refused to accede to the request of leading Counsel for the plaintiff.

Reported By Karen Lim

TEOH KEAT SENG

v.

JAMALUDIN BIN ABDUL MAJID

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC.
[CIVIL APPEAL NO. 12-12-92 (92)]
31 MAY 1993

TORT: Road accident - Vehicles travelling in opposite directions - Crucial issue was on which side of road the collision occurred - Whether any encroachment - Defendant admitted that he failed to take evasive action and collided into plaintiff's motor cycle on plaintiff's side of road - Whether trial Court could rely on sketch plan and apply doctrine of res ipsa loquitur and hold defendant encroached into path of plaintiff - Whether trial Court in error in concluding that plaintiff was not negligent - Trial Court based its decision on comparative reliability of parties in witness box - Whether it is open to appellate Court to interfere with that decision.

This was an appeal by the defendant against the decision of the Sessions Court, Kuala Kangsar which found the defendant totally liable to the plaintiff's claim in respect of an accident which occurred on 14 June 1989 whereby both the vehicles were travelling in opposite directions.

Held:

[1] The trial Court had correctly evaluated the evidence before it and came to a correct decision according to law.

[2] In this appeal, since the trial Court based its decision on the opinion which it formed as to the comparative reliability of the parties in the witness box, it is not open to this Court to interfere with that decision.

[Appeal dismissed with costs].

Cases referred to:

K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***
Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd. [1980] 2 MLJ 182 ***(refd)***
Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor. [1982] 1 MLJ 82 FC ***(refd)***
Multar v. Lim Kim Chet & Anor. [1982] CLJ 107 / [1982] 1 MLJ 184, 185 ***(refd)***
Lloyde v. West Midlands Gas Board [1971] 2 All ER 1240 ***(refd)***
Public Prosecutor v. Tay Bee Seng [1993] 1 CLJ 526 ***(refd)***
Govinda Raju & Anor. v. Laws [1966] 1 MLJ 188 ***(refd)***
Thomas v. Thomas [1947] AC 487 ***(refd)***